No. 17-1606

IN THE

Supreme Court of the United States

RICKY LEE SMITH,
Petitioner,

v.

NANCY A. BERRYHILL,
Acting Commissioner of Social Security,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF OF COURT-APPOINTED *AMICUS CURIAE* IN SUPPORT OF THE JUDGMENT BELOW

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QUESTION PRESENTED

In 1939, Congress eliminated general federal-question jurisdiction in social security cases and instead provided that "[n]o findings of fact or decision" of the social security agency "shall be reviewed by any ... tribunal ... except as herein provided." 42 U.S.C. § 405(h). Congress delegated "full power and authority" to the agency to establish procedures "necessary and appropriate" to adjudicate a large number of claims, *id.* § 405(a), and conferred limited jurisdiction on federal courts to review "final decision[s] of the Commissioner of Social Security made after a hearing," *id.* § 405(g).

The Social Security Administration has established a multi-step process for adjudicating claims, culminating in the Social Security Appeals Council. When an applicant fails to request review by the Appeals Council "within the stated period of time" and "the time for filing has not been extended," the Appeals Council "will dismiss [the] request for review." 20 C.F.R. § 416.1471. Under longstanding agency regulations, "[t]he dismissal of a request for Appeals Council review is binding and not subject to further review." 20 C.F.R. § 416.1472. The Social Security Act itself does not provide for a hearing on the timeliness of petitions for Appeals Council review.

The question presented is whether the dismissal of a petition to the Social Security Appeals Council as untimely is a "final decision of the Commissioner of Social Security made after a hearing" and thus subject to judicial review under 42 U.S.C. § 405(g).

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INTEREST OF *AMICUS CURIAE*

This Court invited Deepak Gupta "to brief and argue this case, as *amicus curiae*, in support of the judgment below." Consistent with the regulations and longstanding interpretation of the Social Security Administration, the Sixth Circuit held below that orders of the Social Security Appeals Council that "dismiss untimely petitions for review" are "not final decisions reviewable in federal court." Pet. App. 8a.

INTRODUCTION

"[T]he Social Security hearing system is probably the largest adjudicative agency in the western world." *Barnhart v. Thomas*, 540 U.S. 20, 28–29 (2003). Congress sought to design a system capable of fairly adjudicating millions of small claims—without engulfing the federal courts. To that end, Congress delegated "full power and authority" to the Social Security Administration to "establish procedures" that it deems "necessary or appropriate" to dispose of a huge volume of claims. 42 U.S.C. § 405(a). At the same time, Congress divested the federal courts of their ordinary federal-question jurisdiction in social security cases, *id.* § 405(h), requiring judicial review only of "final decision[s] of the Commissioner of Social Security made after a hearing," *id.* § 405(g). The question presented is whether that limited category includes dismissals of untimely petitions to the Appeals Council (the final level within the agency).

As this Court has repeatedly recognized, § 405(g) "does not define 'final decision,' instead leaving it to the SSA to give meaning to that term through regulations." *Sims v. Apfel*, 530 U.S. 103, 106 (2000); *see also Weinberger v. Salfi*, 422 U.S. 749, 766 (1975) ("The term 'final decision' is not only left undefined by the Act, but its

meaning is left to the Secretary to flesh out by regulation."). Under regulations in place for decades, claimants must properly exhaust all three levels of review within the agency before they receive a final decision subject to judicial review. Thus, the Appeals Council's dismissal of an untimely appeal is not a "final decision" "made after a hearing" under § 405(g). *See* 20 C.F.R. § 416.1472.

This long-held position embodies the best reading of the statute. Read in the context of the overall statutory scheme, a "final decision" is a decision on the merits of a benefits claim following the exhaustion of agency processes. That is exactly what Solicitor General Bork told this Court forty years ago: "That phrase, incorporating as it does a requirement of exhaustion of administrative remedies, necessarily refers to the final disposition of a claim for benefits on its merits." U.S. Br. 18–19, in *Califano v. Sanders*, 430 U.S. 99 (1977) (No. 75-1443). And it is how the courts, including this one, have understood the statute: "if a claimant fails to request review from the Council, there is no final decision and, as a result, no judicial review." *Sims*, 530 U.S. at 107 (citing 20 C.F.R. § 404.900(b) ("[I]f you . . . do not take the next step within the stated time period . . . you will lose . . . your right to judicial review."). "Only a claimant who proceeds through all three stages receives a final decision." *Bowen v. City of New York*, 476 U.S. 467, 482 (1986).

The phrase "after a hearing" likewise has a settled meaning. Half a century ago, Judge Friendly concluded that the most reasonable way to read it is as referring only to matters on which a hearing is "made mandatory" by the Social Security Act, "not to [decisions] which could lawfully have been made without any hearing at all."

Cappadora v. Celebrezze, 356 F.2d 1, 4 (2d Cir. 1966). Adopting that reading at the government's urging, this Court has held that § 405(g)'s hearing requirement is not satisfied if the claimant's request "may be denied without a hearing," or where a hearing is afforded under "regulations and not by the Social Security Act." *Sanders*, 430 U.S. at 108. Then-Judge Kavanaugh has described this restriction in § 405(g) as "critical," and as not requiring judicial review when "the Social Security Act does not require a hearing." *Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 503–04 (D.C. Cir. 2016). Section 405(g), then, is best read as limiting review to merits decisions, after exhaustion, on which the Act requires a hearing. That interpretation undergirds the agency's regulations.

At a minimum, those regulations are controlling because they reflect "a reasonable interpretation of the statute." *Entergy Corp. v. Riverkeeper*, 556 U.S. 208, 218 (2009). Although this Court's precedents hold that *Chevron* provides an "appropriate legal lens" here, *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), the parties have not even attempted to show that the statute *unambiguously* compels their reading. The Solicitor General says nothing about this Court's jurisprudence on deference. And the petitioner does so only in passing, contending that any ambiguity should be resolved not by the agency but by resort to "a presumption in favor of judicial review." Petr. Br. 20. That presumption, however, has no place here. *See* 42 U.S.C. § 405(h). While "[i]n the best of all worlds, immediate judicial access [for all claimants] might be desirable," Congress "struck a different balance," "requiring that administrative remedies be exhausted before judicial review of the Secretary's decisions takes place." *Heckler v. Ringer*, 466 U.S. 602, 627 (1984). That balance should be respected.

STATEMENT

A. Statutory and regulatory background

1. The Social Security Administration is one of the largest agencies in the federal government, paying out approximately $1 trillion in benefits annually—roughly five percent of the gross domestic product of the United States. *See* SSA, *Fact Sheet on Social Security*, at 1.[1] The agency pays benefits to approximately 63 million people, each of whom receives an average monthly payment of $1,296. *Id.*[2] "Millions of claims are filed every year and hundreds of thousands of claims are contested through three levels of administrative review." Frank S. Bloch, *Social Security Law and Practice* 22 (2012).

Processing this massive number of social security claims requires an "administrative structure" that "affects virtually every American" and is "of a size and extent difficult to comprehend." *Schweiker v. Chilicky*, 487 U.S. 412, 424 (1988). On an annual basis, the Social Security Administration processes approximately 5.5 million old-age and survivors' insurance claims, 2.8 million disability insurance claims, and 2.1 million applications for supplemental security income. *See* SSA, *Annual Statistical Supplement to the Social Security Bulletin, 2017*, at 2.77 (March 2018).[3]

The agency processes those claims "in an informal, non-adversarial manner" designed to ensure that claimants receive benefits whenever they are due. 20

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[1] https://perma.cc/4U73-G2G4.

[2] The figure $1,296 is the average across retired workers, disabled workers, dependents, and survivors.

[3] https://perma.cc/3KV5-LJXY.

C.F.R. § 416.1400(b). "There are four levels of administrative decision-making for Social Security claims—the initial decision plus up to three stages of administrative review—and most claims must pass through each before a decision is subject to judicial review." Bloch, *Social Security Law and Practice* 22. Under the agency's usual procedures, applicants are entitled to an initial determination, a reconsideration of that determination, a hearing before an administrative law judge, and an appeal to the agency's Appeals Council. *See* 20 C.F.R. § 416.1400. The result is that the Social Security Administration oversees "an unusually protective multi-step process for the review and adjudication of disputed claims." *Schweiker*, 487 U.S. at 424.

From the agency's inception in 1935, Congress and the Social Security Administration have had to confront the question of how to "handle a large number of small claims," balancing the need for fair adjudication with the time and expense required for additional layers of review. *Report of the Social Security Board to the President, Proposed Changes in the Social Security Act*, H.R. Doc. No. 110, 76th Cong., 1st Sess., 11 (1939). As this Court has noted, given the sheer scale of the Social Security hearing system, "[t]he need for efficiency is self-evident." *Barnhart v. Thomas*, 540 U.S. 20, 29 (2003).

Asked to provide guidance to Congress shortly after the agency's creation, the Board of the Social Security Administration recommended that Congress follow the government's prior experience with large-scale programs, like the administration of veterans' benefits, and enact a law requiring the availability of judicial review in only a small set of circumstances. *Id.* As the Chairman of the Social Security Board put it, "where there is a volume

of small claims," judicial review risks "a dual administration, or duplicate administration of the law." 3 *Hearings on Social Security before the House Committee on Ways and Means*, 76th Cong., 1st Sess., 2288 (1939) (testimony of Dr. Arthur J. Altmeyer, Chairman of the Social Security Board).

2. Congress implemented the Board's recommendation with the Social Security Act Amendments of 1939, Pub. L. No. 76-379, 53 Stat. 1360. That Act codified provisions for the judicial review of social security determinations that have remained in effect to this day. *See id.* §§ 205(g), (h); 42 U.S.C. §§ 405(g), (h).

To avoid depleting the resources of the agency and the judiciary, Congress completely withdrew agency determinations from the general statutes governing federal jurisdiction—including 28 U.S.C. § 1331. *See* 42 U.S.C. § 405(h). Using sweeping language, Congress provided that "[n]o findings of fact or decision of the [agency] shall be reviewed by any person, tribunal, or governmental agency except as herein provided." *Id.* Congress then guaranteed judicial review only in limited circumstances, where a claimant had exhausted all remedies to obtain a "final decision of the [agency] made after a hearing." *Id.* § 405(g). Consistent with its vision of linking judicial review to full compliance with the agency's own procedures, Congress did "not define 'final decision,' instead leaving it to the SSA to give meaning to that term through regulations." *Sims v. Apfel*, 530 U.S. 103, 106 (2000).

3. For decades, the Social Security Administration has held the view that the phrase "final decision . . . made after a hearing" in § 405(g) "grants the district courts jurisdiction to review only substantive determinations

denying benefits." U.S. Br. 20, in *Califano v. Sanders*, No. 75-1443. Before 1980, when this position was codified in regulations, the agency took that stance in litigation. The Solicitor General, for example, argued to this Court that "final decision" in § 405(g) "necessarily refers to the final disposition of a claim for benefits on its merits." *Id.* at 18; *see also Sheehan v. Sec'y of Health, Ed. & Welfare*, 593 F.2d 323, 325 (8th Cir. 1979) (explaining that 405(g)'s "final decision" language precludes review where a claim has been dismissed due to an untimely appeal).

In the pre-regulation period (1939–1980), this interpretation of § 405(g) was also accepted by federal courts in a variety of contexts. *See, e.g.*, *Hobby v. Hodges*, 215 F.2d 754, 757 (10th Cir. 1954) (res judicata); *Gianforti v. Ribicoff*, 200 F. Supp. 450, 452 (W.D.N.Y. 1961) (untimely request for review); *Filice v. Celebrezze*, 319 F.2d 443, 445 (9th Cir. 1963) (denial of request to reopen case); *Davis v. Richardson*, 460 F.2d 772, 775 (3d Cir. 1972) (same); *Sheehan*, 593 F.2d at 325 (untimely request for review).

In 1980, the agency formally adopted regulations that reflected the general consensus. *See* 45 Fed. Reg. 52078 (Aug. 5, 1980). The agency noted that "[u]nder existing law, a person may seek judicial review only if he or she has received an adverse initial determination and has exhausted his or her rights to administrative review." *Id.* at 52079. The regulations therefore define the agency's "final decision" as the decision made after a claimant has "completed the steps of the administrative review process." 20 C.F.R. § 416.1400(a)(5).

The regulations also specify a variety of procedural decisions that do not qualify as a final decision. *See, e.g.*, 20 C.F.R. 416.1403(a). Most relevant to this case, the

regulations specify that the Appeals Council will dismiss a request for review that is not timely filed, and that such a dismissal "is binding and not subject to further review." 20 C.F.R. §§ 416.1471–72; *see also* 45 Fed. Reg. 52,078, 52,096, 52,104 (Aug. 5, 1980). The regulations "make a clear distinction in regard to rights of judicial review between dismissals and determinations on the merits by the Appeals Council." 64 Fed. Reg. 57,687, 57,689 (Oct. 26, 1999). As the agency has noted, this distinction reflects its established position "that an Appeals Council dismissal is not a 'final decision of the Commissioner of Social Security made after a hearing'" under 42 U.S.C. § 405(g). *Id.* These regulations have remained in effect from 1980 through today.

Even as the agency's regulations remained constant, the number of claims it handled continued to swell, sparking concern that federal courts were "deluged with cases filed by people removed from the disability rolls." *See New Court Sought for Benefit Cases*, N.Y. Times, Mar. 9, 1986. In December 1985, for instance, there were 52,795 Social Security cases pending in district courts, a number that had more than doubled in only three years. *Id.* These numbers led to proposals for the creation of a "Social Security Court" that could handle the tens of thousands of federal court cases generated by disputed claims and their associated appeals. *Id.* Ultimately, Congress declined to create a new court, relying instead on the existing provisions in sections 405(g) and (h) to limit the burden on the federal courts.

4. This confidence in § 405(g) was based on decades of experience. Throughout that period, § 405(g) had been interpreted as guaranteeing judicial review only in limited circumstances as described above, rather than

authorizing broad review. Congress not only left § 405(g) in place when it amended or reenacted the Social Security Act over the years, but also expressly incorporated § 405(g) into more than a dozen additional statutes, including:

- 42 U.S.C. § 1395ff (claims for benefits under Medicare Parts A and B)
- 42 U.S.C. § 1395w-22 (benefits under Medicare Part C)
- 42 U.S.C. § 1395w-114 (subsidies under Medicare Part D)
- 42 U.S.C. § 1395cc (eligibility of Medicare providers)
- 42 U.S.C. § 1396i (compensation for certain Medicaid providers)
- 42 U.S.C. § 1009 (special benefits for certain World War II veterans)
- 30 U.S.C. § 923 (claims by miners suffering from black lung)

A compendium of these statutory provisions is set forth in an appendix to this brief. As this list of provisions indicates, § 405(g) has been incorporated into programs requiring the government to administer massive numbers of claims (*e.g.*, Medicaid and Medicare), and also into more targeted benefits programs (*e.g.*, those for injured miners or war veterans).

Many of these programs, in turn, have regulations implementing the term "final decision . . . after a hearing" that mirror those of the Social Security Administration. The Medicare Appeals Council, for instance, similarly provides by regulation that untimely appeals from determinations under Medicare Parts A

and B may be dismissed, and that such dismissals are "not subject to further review." 42 C.F.R. §§ 405.1114–16. Similar regulations govern appeals from subsidy determinations under Medicare Part D. *See* 20 C.F.R. §§ 418.3665–70. And some regulations simply apply the Social Security Appeals Council's rules directly, mimicking the statutory incorporation of 42 U.S.C. § 405(g). *See* 20 C.F.R. § 408.1050 (incorporating 20 C.F.R. §§ 416.1467–82).

The net result is that the claims processing regimes of numerous massive federal benefits programs adopt the understanding of 405(g) that the Social Security Administration has adhered to for decades.

B. Facts and procedural history

1. From 1988 to 2004, petitioner Ricky Lee Smith received disability benefits from the Social Security Administration. J.A. 10. In 2004, he was found to be ineligible for further benefits because he had too many financial resources. *Id.*; *see also* 42 U.S.C. § 1381a (providing that a claimant's entitlement to benefits depends in part on "income and resources"). Eight years later, he filed a new application for benefits, which was denied initially on September 6, 2012, and denied on reconsideration on December 6, 2012. J.A. 8. At Mr. Smith's request, an ALJ held a hearing regarding his claim; the ALJ denied his application for benefits on March 26, 2014. J.A. 23. Mr. Smith was sent a notice of decision that told him he had 60 days to file an appeal with the Appeals Council. J.A. 5.

The Social Security Administration does not have a record of receiving Mr. Smith's appeal to the Appeals Council until months after this deadline had run, when it

received a fax dated September 21, 2014, that contained a copy of a letter dated April 24, 2014. *See* J.A. 30–38 (fax); J.A. 24–29 (letter). A claims representative at the Social Security Administration responded to the fax by filling out a request for review on behalf of Mr. Smith and filing it with the Appeals Council. J.A. 38–39. The Appeals Council found that his claim was not timely filed and found "no good cause to extend the time for filing"—and, accordingly, dismissed Mr. Smith's request for review. J.A. 40–42. Mr. Smith, however, alleges that he timely filed his appeal on April 24, 2014. J.A. 46.

2. Mr. Smith then filed a complaint in federal district court. J.A. 45–47. He alleged that he timely appealed on April 24, and that he "has exhausted all of his administrative remedies." J.A. 46. He therefore asked the court "to review . . . the final decision of the Commissioner holding that the Plaintiff is not entitled to a period of disability," alleging that the determination that he was not disabled "was not supported by substantial evidence." J.A. 46–47. The district court dismissed the complaint for lack of jurisdiction, granting the government's motion to dismiss on the ground that "a decision by the Commissioner to dismiss a claimant's untimely request for an appeal before the Appeals Council is not a final decision subject to judicial review" under 42 U.S.C. § 405(g). Pet. App. 25a.

3. The Sixth Circuit affirmed on the same grounds, noting that this understanding of 405(g) is consistent with this Court's precedent and the interpretations of every federal circuit court to consider the issue apart from the Eleventh Circuit. Pet. App. 6a–7a.

4. Mr. Smith sought certiorari in this Court. While that request for certiorari was pending, the Office of the

Solicitor General "reexamined the question and concluded that its prior position was incorrect." SG Br. 22. Although the Solicitor General states that "the government" has changed its position, *id.*, its brief is not signed by any attorneys of the Social Security Administration, and *amicus* is unaware of any announcement by the agency that it has reconsidered its views in light of its own understanding of the administrative scheme.

This Court granted the petitioner's request for certiorari, and appointed *amicus* to argue in support of the judgment below.

SUMMARY OF ARGUMENT

I.A. Section 405(g) must be—and always has been—interpreted by reference to its role in the overall statutory plan. In passing the Social Security Act, Congress created a massive, inquisitorial system to process millions of disability claims. It layered many procedural safeguards for claimants throughout the administrative structure. To prevent federal courts from being overrun, Congress also enacted § 405(g), which defines the circumstances in which claimants are entitled to judicial review. The parties give that context short shrift, relying heavily on background presumptions drawn from the APA. But as this Court has emphasized, the Social Security Act contemplates a scheme of judicial review alien to conventional APA practice. It does so to strike a balance between fairness to applicants and preserving judicial and administrative efficacy.

B. To that end, § 405(g) guarantees judicial review only for decisions that are "final" and "made after a hearing." In context, a "final decision" is a decision on the merits of a claim for benefits following exhaustion of

agency processes. Although "final" has many meanings, this is the one most faithful to the statute. It is also the reading that was advanced by Solicitor General Bork in this Court, that is consistent with the way this Court has described exhaustion under § 405(g) and related statutes in the Medicare context, and that comports with the vast majority of lower-court interpretations.

C. A final decision "after a hearing" is a decision on a matter on which the Act requires a hearing. Fifty years ago, Judge Friendly acknowledged that § 405(g) could be read literally to apply to *any* final decision handed down after a hearing. But, in view of the overall statutory structure, the unique nature of the social security agency process, and Congress's imposition of a hearing requirement in § 405(b), he concluded that the best reading was narrower: the statute applies only where the Social Security Act itself makes a hearing mandatory. At the urging of the Solicitor General, and in express reliance on Judge Friendly's analysis, this Court adopted that reading in *Califano v. Sanders*, 430 U.S. 99, 108 (1977). *Sanders* made clear that the statute does not require review where the claimant's contention "may be denied without a hearing" or where the hearing is "afforded by the Secretary's regulations and not by the Social Security Act." *Id.*; *see also Stovic v. R.R. Ret. Bd.*, 826 F.3d 500, 503–04 (D.C. Cir. 2016) (Kavanaugh, J.) (same).

D. The agency's interpretation of § 405(g) is not only the best reading on its own terms, but it is also supported by administrative practice and judicial decisions in other contexts. In social security cases, courts have declined to review many other procedural determinations based on the same reading of § 405(g). And in cases arising under

other statutes that incorporate § 405(g)—including the Medicare Act—courts have also embraced that reading.

II. At a minimum, the agency's longstanding interpretation of § 405(g), as reflected in its regulations, is reasonable and entitled to deference. Although this Court has repeatedly deferred to social security regulations, the parties largely ignore their burden to show that the statute unambiguously forecloses the agency's position. But this Court has itself acknowledged the statute's ambiguity and the agency's role in fleshing out its meaning. The agency's expertise, its practical understanding, and the consistency and longevity of its position also support deference here. Finally, the benefits of requiring review for claimants are unjustified in light of the costs for the agency and the courts—and, potentially, even for the claimants themselves.

ARGUMENT

ORDERS OF THE SOCIAL SECURITY APPEALS COUNCIL DISMISSING REQUESTS FOR REVIEW AS UNTIMELY ARE NOT JUDICIALLY REVIEWABLE UNDER SECTION 405(G).

The Social Security Act confers jurisdiction on the federal courts to review "final decision[s] of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). The agency and this Court have always understood the statute to require "exhaustion of the administrative remedies provided." *Mathews v. Eldridge*, 424 U.S. 319, 327 (1976). "Only a claimant who proceeds through all three stages receives a final decision from the Secretary." *Bowen v. City of New York*, 476 U.S. 467, 482 (1986).

In keeping with that understanding, the agency's regulations have provided since 1980 that orders of the Social Security Appeals Council dismissing requests for review as untimely are not judicially reviewable under 405(g). *See* 20 C.F.R. § 416.1472; *id.* § 416.1403(a)(8). These regulations are not "manifestly contrary to the statute." *Astrue v. Capato*, 566 U.S. 541, 558 (2012). Under this Court's precedents, because "[t]he SSA's interpretation of the relevant provisions, adhered to without deviation for many decades, is at least reasonable," it is "entitled to this Court's deference." *Id.*

The parties fall short of carrying their burden to show either that the statute unambiguously compels a contrary reading or that the agency's longstanding interpretation is unreasonable. In fact, the Social Security Administration's longstanding position embodies the best reading of the Act. Section 405(g) requires judicial review only of decisions on the merits, where the Act provides for a hearing and the claimant has exhausted the agency's multi-step administrative process. Section 405(g) does *not* mandate that federal courts sit in judgment of every procedural ruling concerning compliance with the agency's internal exhaustion rules. This reading of § 405(g) is supported by decades of decisions under both the Social Security Act and the statutes and regulations governing other large-scale benefits programs.

I. The agency's longstanding interpretation reflects the best reading of the statute.

A. Section 405(g) should be interpreted based on its specific text, context, and structure.

Interpretation of § 405(g)—like the interpretation of any statute—"begins with the text." *Ross v. Blake*, 136 S.

Ct. 1850, 1856 (2016). In that enterprise, of course, "context is everything." A. Scalia, *A Matter of Interpretation* 37 (1997). Courts "interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose." *Abramski v. United States*, 134 S. Ct. 2259, 2267 (2014). Therefore, "reasonable statutory interpretation must account for both 'the specific context in which . . . language is used' and 'the broader context of the statute as a whole.'" *Utility Air Regulatory Grp. v. EPA*, 573 U.S. 302, 312 (2014) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

Section 405(g) cannot be properly interpreted without due regard for the context in which it arose: the creation of a massive, quasi-judicial process for adjudicating millions of small social security claims, with express restrictions on the circumstances in which judicial review must be allowed. Consistent with that goal, Congress imposed two limits on judicial review. It first took the unusual step of withdrawing the courts' jurisdiction under any other statutes that might apply, including 28 U.S.C. § 1331 (and, subsequently, the Administrative Procedure Act). *See* 42 U.S.C. § 405(h); *Weinberger v. Salfi*, 422 U.S. 749, 766 (1975). It then guaranteed only that judicial review be available for "final decision[s] . . . made after a hearing." 42 U.S.C. § 405(g); *see also Mathews*, 424 U.S. at 327 ("The only avenue for judicial review is 42 U.S.C. § 405(g), which requires exhaustion of the administrative remedies provided under the Act as a jurisdictional prerequisite."). The requirement set forth in § 405(g) is critical: "the statute empowers district courts to review a particular type of decision by the Secretary, that type being those which are 'final' and 'made after a hearing.'" *Salfi*, 422 U.S. at 764.

Here, the parties approach the statutory text as though the only relevant context consists of "customary usage in administrative law." SG Br. 22; *see also* Petr. Br. 14–15. On that basis, they rely heavily on presumptions and doctrines derived from cases decided under the Administrative Procedure Act (APA). *See* SG Br. 26–29; Petr Br. 14–17. For example, both parties place great weight on the "hallmarks of APA finality." *Sackett v. EPA*, 566 U.S. 120, 126 (2012); *see* SG Br. 27–29; Petr Br. 15–16. And the petitioner repeatedly highlights the "'strong presumption' favoring judicial review of administrative action." Petr. Br. 17 (quoting *Mach Mining, LLC v. EEOC*, 135 S. Ct. 1645, 1651 (2015)).

These arguments rest on a faulty premise. The Social Security Act's judicial-review provisions are not properly interpreted as secretly embodying the presumptions of a different and much broader administrative law statute passed years later. *See New Prime Inc. v. Oliveira*, 139 S. Ct. 532, 539 (2019) ("[I]f judges could freely invest old statutory terms with new meanings, we would risk amending legislation outside the single, finely wrought and exhaustively considered, procedure' the Constitution commands."). To be sure, the APA codified certain "preexisting principles of judicial review of agency action." SG. Br. 28 (citing *I.C.C. v. Bhd. of Locomotive Eng'rs*, 482 U.S. 270, 282 (1987)). But "[w]hen Congress enacted the APA to provide a general authorization for review of agency action in the district courts, it did not intend that general grant of jurisdiction to duplicate the previously established special statutory procedures relating to specific agencies." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988); *see also QinetiQ US Holdings, Inc. & Subsidiaries v. Comm'r of Internal Revenue*, 845 F.3d 555, 560 (4th Cir. 2017) ("Some agency-specific

statutes . . . provide materially different procedures for judicial review that predate the APA's enactment."). Section 405(g) must therefore be interpreted by reference to its agency-specific statutory context, not by reference to general APA doctrines.

The structure of the Social Security Act reflects Congress's effort to "create an orderly, and not unduly vexatious, system for administrative and judicial review of the unimaginable number of decisions of claims for retirement and disability benefits filed under the Act." *Giacone v. Schweiker*, 656 F.2d 1238, 1241 (7th Cir. 1981). This system mandates a scheme of review that is "alien to traditional review of agency action under the Administrative Procedure Act." *Sullivan v. Hudson*, 490 U.S. 877, 885 (1989). The result Congress sought to avoid was a potentially intolerable burden on the federal courts, which in 1939 had merely 179 district judges,[4] if every conceivably determinative procedural decision reached by the agency were judicially reviewable.

Congress responded to this concern in § 405(g) and § 405(h), which required "that administrative remedies be exhausted before judicial review of the Secretary's decisions takes place." *Heckler v. Ringer*, 466 U.S. 602, 627 (1984). Especially given that the inquisitorial social security process boasts powerful protections for claimants, this limitation on review reflected a sensible policy choice: "[C]ases of individual hardship . . . had to be balanced against the potential for overly casual or premature judicial intervention in an administrative

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[4] *See* Authorized Judgeships, U.S. Courts, https://perma.cc/55EA-5MU7 (last accessed Jan. 31, 2019).

system that processes literally millions of claims every year." *Id.*

Accordingly, § 405(g) cannot be treated as though it were a workaday administrative law requirement. "As provisions for judicial review of agency action go, § 405(g) is somewhat unusual." *Hudson*, 490 U.S. at 885. And that "unusual" character flows from § 405(g)'s central role in preventing the federal courts from being swamped by disputes over the rules of the many-layered administrative process governing the nation's largest social welfare program.[5]

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[5] The Solicitor General suggests that even if this Court agrees that an Appeals Council dismissal on timeliness grounds is not reviewable in federal court, the court below nonetheless erred by holding that the complaint should be dismissed for lack of jurisdiction. *See* U.S. Br. 24 n.12. Courts, "including this Court," can be "less than meticulous" in their use of the word "jurisdictional," *Kontrick v. Ryan*, 540 U.S. 443, 454 (2004), and this Court has previously referred to § 405(g)'s exhaustion requirement as both "waivable" and "jurisdictional," in some tension with contemporary usage. *See, e.g.*, *Heckler v. Day*, 467 U.S. 104, 111 n.14 (1984) ("The jurisdictional requirement that administrative remedies be exhausted is waivable."). But this question of usage provides no barrier to affirmance here. The district court granted the agency's motion to dismiss without characterizing the dismissal as jurisdictional. Pet. App. 26a. And although the Sixth Circuit said in passing that "the district court lacked jurisdiction," Pet. App. 5a, nothing in the reasoning or substance of the judgment below was in any way inconsistent with this Court's holding that § 405(g)'s exhaustion requirement is "waivable." *Mathews*, 424 U.S. at 328. The bottom line is that, under a correct interpretation of the statute, Mr. Smith is not entitled to judicial review.

B. A "final decision" is a decision on the merits of a claim for benefits following the exhaustion of agency processes.

The first requirement imposed under § 405(g) is a "final decision" by the Commissioner of Social Security. Relying principally on inapposite APA presumptions, the parties contend that "final decision" encompasses dismissals by the Commissioner for failure to exhaust administrative remedies or comply with prescribed time limitations. That conclusion, they assert, is supported by the dictionary definitions of "final" and "decision." *See* SG Br. 26; Petr Br. 14. On this basis, they contend that Mr. Smith received a "final decision," whether on the timeliness of his petition for Appeals Counsel review, his entitlement to a "good cause" extension of the deadline, or both.

1. That contention is mistaken. As this Court has already emphasized while interpreting § 405(g), finality is a flexible, context-specific, and "intensely practical" concept here: "Decisions in different contexts have emphasized that the nature of the claim being asserted and the consequences of deferment of judicial review are important factors in determining whether a statutory requirement of finality has been satisfied." *Mathews*, 424 U.S. at 331 n.11 (collecting cases); *see also Losh v. Fabian*, 592 F.3d 820, 825–26 (8th Cir. 2010) (recognizing several "reasonable" interpretations of "finality in the context of AEDPA's statute of limitations"); *Herman v. Local 305, Nat'l Post Office Mail Handlers, LIUNA, AFL-CIO*, 214 F.3d 475, 479 (4th Cir. 2000) ("Because there are several plausible meanings for the term 'final decision,' we believe the term is ambiguous."); *Shepherd v. Comm'r*, 147 F.3d 633, 634 (7th Cir. 1998) ("There are

exceptions created by statute, rule, and judicial doctrine to the principle that we can review only final decisions of the district courts. And the very concept of 'finality' is ambiguous."); *Ass'n of Cmty. Orgs. for Reform Now (ACORN) v. Ill. State Bd. of Elections*, 75 F.3d 304, 306 (7th Cir. 1996) (emphasizing the "uncertain meaning of 'final decision' in postjudgment proceedings"); *Sumy v. Schlossberg*, 777 F.2d 921, 923 (4th Cir. 1985) ("It is commonly acknowledged that 'finality' under § 158 or its predecessors must be interpreted in light of the special circumstances of bankruptcy cases."); *Allcare Hospice, Inc. v. Sebelius*, No. 11-Civ-365, 2012 WL 5246512, at *2 (E.D. Okla. Oct. 23, 2012) ("The court finds the phrase 'decision of the Board' is sufficiently ambiguous as to whether it includes the Board's denial of a good cause extension.").[6]

Here, there are several imaginable interpretations of § 405(g). It might, as the parties suggest, refer broadly to any conceivable adverse procedural or merits-based determination reached by the Commissioner that causes a claimant's review process to terminate. That position is supported principally by the absence of an express textual limitation on which "final decision[s]" trigger a right to judicial review. *See Powerex Corp. v. Reliant Energy Servs., Inc.*, 551 U.S. 224, 231 (2007). Or § 405(g)

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[6] The Solicitor General relies on cases interpreting finality under 28 U.S.C. § 1291, Br. 31–32, but as this Court emphasized while interpreting § 405(g), "certain of the policy considerations implicated in §§ 1257 and 1291 cases are different from those that are relevant here." *Mathews*, 424 U.S. at 331 n.11. The Solicitor General also misses the main point that *Mathews* was making: that context—including "the nature of the claim being asserted and the consequences of deferment of judicial review"—is crucial to interpreting the phrase "final decision" in § 405(g). *Id.*

might perhaps be read as referring to some but not all adverse determinations that cause a claimant's review process to terminate. Finally, as the Solicitor General argued in 1976, the term "final decision" in § 405(g) might "necessarily refer[] to the final disposition of a claim for benefits on its merits" because it incorporates "a requirement of exhaustion of administrative remedies." U.S. Br. 18, *Califano v. Sanders*, No. 75-1443.

2. As nearly every court addressing the issue has concluded, General Bork's interpretation is the most compelling. First consider how this Court has used the phrase "final decision" in Social Security cases while describing the scope of judicial review under § 405(g). In *Bowen v. City of New York*, the Court explained that "[t]o obtain a final decision from the Secretary a claimant is required to exhaust his administrative remedies by proceeding through all three stages of the administrative appeals process. Only a claimant who proceeds through all three stages receives a final decision from the Secretary." 476 U.S. at 482. More recently, in *Sims v. Apfel*, the Court observed that "[i]f a claimant fails to request review from the Council, there is no final decision and, as a result, no judicial review in most cases. In administrative-law parlance, such a claimant may not obtain judicial review because he has failed to exhaust administrative remedies." 530 U.S. at 107.

To be sure, as the Solicitor General cautions, neither *Bowen* nor *Sims* squarely addressed the specific question at issue here. *See* SG Br. 34. But it is no coincidence that both cases describe a "final decision" as one that occurs after exhaustion of all administrative remedies—in other words, one that addresses the merits of a claim for benefits after a claimant has successfully

completed "all three stages" of review. *Bowen*, 476 U.S. at 482. Whether understood as proof of ordinary usage, *see Lamar, Archer & Cofrin, LLP v. Appling*, 138 S. Ct. 1752, 1759 (2018), or as evidence of judicial usage, *cf. Kasten v. Saint-Gobain Performance Plastics Corp.*, 563 U.S. 1, 9 (2011), these decisions show that it is natural to read "final decision" in this statute as referring to decisions on the merits after an exhaustion of remedies.

That reading is supported by statutory structure. Section 405 of the Social Security Act does not refer to any extension of the 60-day time limit for seeking review of adverse benefits determinations by ALJs. Because the statute never requires the Commissioner to entertain untimely requests for review, the regulations allowing discretionary good cause extensions reflect nothing more than a policy judgment by the agency to protect claimants beyond statutory mandates. In these circumstances, it makes little sense to read "final decision" in § 405(g) as referring to dismissals on procedural grounds unmentioned in the statute that exist solely by the agency's grace. The more natural reading is that § 405(g) refers to the kinds of "final decisions" required by the statute—which principally consist of decisions on the merits of claims for benefits. Any other reading would undermine § 405(g)'s role in the statutory plan, and create perverse incentives, by inviting a flood of federal cases every time the agency exercises its discretion to create a new exhaustion rule or recognize an exemption from an existing rule. *See Filice*, 319 F.2d at 445–46 (holding that "[t]he orders made judicially reviewable by Subsection (g) of Section 405 are orders authorized by Subsection (b) of Section 405 which make findings of fact and decisions as to rights of applicants for payment, or which affirm, modify, or reverse such orders").

This understanding of the statute is bolstered by *Your Home Visiting Nurse Servs., Inc. v. Shalala*, 525 U.S. 449 (1999). That case presented the question whether a Medicare provider may obtain judicial review of an intermediary's refusal to reopen a finalized cost report. Applying *Chevron* deference, the Court upheld the agency's position that such a refusal was not the kind of "final determination," 42 U.S.C. § 1395*oo*(a)(1)(A)(i), that triggered a right to review. While analyzing "final determination," the Court emphasized that "the right of a provider to seek reopening exists only by grace of the Secretary," rather than as a matter of statutory right. *Your Home Visiting Nurse Servs.*, 525 U.S. at 454. The Court added that the "statutory purpose of imposing a 180-day limit on the right to seek Board review . . . would be frustrated" by judicial review. *Id.* Both of those considerations apply fully to this case.

Precedent is instructive for still another reason: it confirms that the meaning of "final decision" in § 405(g) is inextricably intertwined with the agency's own exhaustion requirements. This Court could hardly have been clearer on that point in *Salfi*: "[T]he requirement of a 'final decision' contained in § 405(g) is not precisely analogous to the more classical jurisdictional requirements contained in such sections of Title 28 as 1331 and 1332. The term 'final decision' is not only left undefined by the Act, but its meaning is left to the Secretary to flesh out by regulation . . . The statutory scheme is thus one in which the Secretary may specify such requirements for exhaustion as he deems serve his own interests in effective and efficient administration." 422 U.S. at 766. One year later, the Court reaffirmed this interpretation in *Mathews*: "[U]nder § 405(g) the power to determine when finality has occurred ordinarily rests with the

Secretary since ultimate responsibility for the integrity of the administrative program is his." 424 U.S. at 330. Then, decades after *Salfi* and *Mathews*, in an opinion by Justice Thomas, the Court again held that "the Act does not define 'final decision,' instead leaving it to the [agency] to give meaning to that term through regulations." *Sims*, 530 U.S. at 106 (citing *Salfi*, 442 U.S. at 766).

3. Following this Court's guidance, many other courts have agreed that the term "final decision" mandates judicial review only of agency decisions on the merits of claims for benefits. As one court put it, "'[F]inal decision,' read in the context of the elaborate scheme for administrative determination of disability claims which precedes it, plainly refers to a decision on the merits." *Peterson v. Califano*, 631 F.2d 628, 630 (9th Cir. 1980); *accord Smith v. Heckler*, 761 F.2d 516, 518 (8th Cir. 1985) (holding that when an "action does not address the merits of the claim," it "cannot be considered appealable"); *Rios v. Sec'y of Health, Ed. & Welfare*, 614 F.2d 25, 26–27 (1st Cir. 1980) ("The 'final decision of the Secretary' refers to the initial substantive decision of the Secretary on the benefits claim.").

In sum, giving "final decision" its plain meaning within the "context of the statute as a whole," *Utility Air*, 573 U.S. at 312, § 405(g) is best read as requiring judicial review of decisions by the agency denying claims for benefits on their merits. That reading underlies the agency's own regulations governing access to judicial review when requests for Appeals Council review are dismissed as untimely. *See* 20 C.F.R. § 416.1472; *id.* § 416.1403. It has also been the government's own position for decades—including as presented to this

Court by numerous Solicitors General. *See, e.g.*, U.S. Br. 16, *Sims v. Apfel*, No. 98-9537 (Solicitor General Waxman); U.S. Br. 20, *Heckler v. City of New York*, No. 84-1923 (Solicitor General Fried); U.S. Br. 18–19, *Califano v. Sanders*, No. 75-1443 (Solicitor General Bork). And this interpretation respects the balance Congress struck in weighing "cases of individual hardship" against the perils of "overly casual or premature judicial intervention in an administrative system that processes literally millions of claims every year." *Ringer*, 466 U.S. at 627.

In practice, because the Commissioner is authorized to create (and to waive) exhaustion requirements that ensure "efficient administration," *Salfi*, 422 U.S. at 766, the agency can effectively allow judicial review where § 405(g) does not compel it. That is a standard feature of waivable exhaustion requirements. But it is one thing to recognize that the Commissioner can raise the ceiling on opportunities for judicial review. It is quite another to maintain that § 405(g) creates a floor that mandates access to judicial review for every conceivable determination by the agency that might cause a claimants' proceedings to terminate. That is not what § 405(g) says and it is not what Congress intended.[7]

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[7] To resist this conclusion, the Solicitor General (at 29-30) relies on § 405(g)'s reference to § 405(a). In relevant part, § 405(g) provides: "[W]here a claim has been denied by the Commissioner . . . because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) of this section, the court shall review only the question of conformity with such regulations and the validity of such regulations." From this, the Solicitor General infers that a court "may review a claimant's compliance with SSA regulations regarding the timeliness of a request for Appeals Council review of an ALJ's decision." SG

C. A final decision "after a hearing" is a decision on a matter on which the Social Security Act requires a hearing.

Even where the Commissioner has rendered a "final decision" within the meaning of § 405(g), judicial review is not authorized unless that decision was made "after a hearing." In this case, there was no hearing on the timeliness of Mr. Smith's request for Appeals Council review, or on whether to grant a discretionary good-cause exception from the 60-day limit. Nor does the Social Security Act require that such a hearing occur. Nevertheless, the parties contend that the "after a hearing" requirement was satisfied because Mr. Smith complied with the agency's chosen procedures for reviewing timeliness and assessing good cause. *See* Petr. Br. 23–24; SG Br. 28, 35–37. In the alternative, they contend that Mr. Smith meets the "after a hearing" requirement because the ALJ held a hearing on his claim

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Br. 29.

Not so. As the agency's own regulations confirm, this part of § 405(g) addresses cases in which "the Secretary's decision is adverse to a party due to a party's failure to submit proof in conformity with a regulation prescribed under [§ 405(a)] *pertaining to the type of proof a party must offer to establish entitlement to payment.*" 42 C.F.R. § 405.1136 (emphasis added). In that circumstance, "the court will review only whether the proof conforms with the regulation and the validity of the regulation." *Id.* But Mr. Smith's lawsuit concerns neither "entitlement to payment" or, in the language of § 405(g), a "claim [that] has been denied by the Commissioner." Instead, it concerns only the Appeals Council's determination on timeliness and good cause. Those findings do not constitute a denial of his claim for benefits because of his failure to submit proof in conformity with regulations. Indeed, they say nothing about the evidentiary support for his claim for benefits, and address only whether his agency appeal was procedurally proper.

for benefits. *See* Petr. Br. 23; SG Br. 37. These arguments are based on an incorrect interpretation of § 405(g)—indeed, on an interpretation that this Court has *already* considered and rejected.

1. That story begins in 1966, when Judge Friendly was confronted, as a matter of first impression, with a dispute over § 405(g)'s hearing requirement. "On a strictly literal reading," he conceded, "§ 405(g) could be interpreted as applying to any final decision of the Secretary that was handed down after a hearing, albeit a hearing not required by the statute." *Cappadora v. Celebrezze*, 356 F.2d 1, 4 (2d Cir. 1966). But "such an interpretation," he cautioned, "would be unnatural and unsound" in light of the Act "as a whole.'" *Id.* The better reading, he concluded, is that § 405(g)'s "after a hearing" requirement must be interpreted as referring solely to hearings *required by statute*.

Judge Friendly's reasoning began with a simple premise: Congress knew that this agency "would be confronted with a volume of applications probably unparalleled in federal administration." *Id.* Congress also anticipated that "the interests of the agency and the claimant would in most cases coincide," since "the Social Security Administration would be as concerned as the applicant in the payment of a proper claim." *Id.* For these reasons, Congress did not impose the "many requirements of notice and hearing in the usual regulatory statute." *Id.* Instead, the agency "was compelled to hold a hearing in only one instance—where an adverse *ex parte* determination had been made and timely request for a hearing was filed." *Id.* (citing § 405(b)).

"In this context," Judge Friendly explained, statutory text and structure compel a narrower rather than a broader interpretation of § 405(g). *Id.* "The reasonable reading of § 405(g) is that it was intended to apply to a final decision rendered *after a hearing thus made mandatory*, not to a decision which could lawfully have been made without any hearing at all and in that event plainly would not have come under the terms of the section." *Id.* Judge Friendly then added that a more expansive view of "after a hearing" could lead to perverse outcomes: "[T]he broader reading could operate adversely to claimants generally since if a nonmandatory hearing would entail judicial review not otherwise available, this might deter the agency from giving a procedural benefit which the statute does not demand." *Id.* at 5.

2. Following Judge Friendly's influential interpretation of § 405(g) in *Cappadora*, this Court decided *Salfi* and *Mathews*—the cases on which the parties principally rely. *See* Petr. Br. 23–24; SG Br. 35–37. In both cases, the Court allowed judicial review under § 405(g), even though the claimant hadn't exhausted remedies or participated in a hearing on the question at issue. *See Mathews*, 424 U.S. at 331; *Salfi*, 422 U.S. at 767. But in both cases, the Court limited its holdings to cases where a claimant presents colorable constitutional claims. This was confirmed in *Sanders*, where the Court made that restriction explicit and adopted Judge Friendly's analysis as the proper interpretation of "after a hearing."

The claimants in *Salfi* were widows and step-children of deceased wage earners. *See id.* at 753. Their sole contention was that the Act violated the Constitution by prohibiting them from receiving insurance benefits due

to the duration of their relationship to the wage earner. *See id.* Presented with this claim, the Court emphasized that it made little sense to strictly insist on § 405(g)'s requirements, given that the agency lacked jurisdiction to address any constitutional arguments. *See id.* at 765–68. That logic applied equally to the hearing requirement. *See id.* at 767 (explaining that a hearing "would be futile and wasteful" where "the only issue to be resolved is a matter of constitutional law concededly beyond [the Secretary's] competence to decide"). Given that requiring exhaustion and a hearing would be pointless, and that the Secretary had not raised any objections on this ground, the Court held that the claimants "satisf[ied] the requirements of § 405(g)." *Id.*

The same principles controlled in *Mathews*. There, a claimant raised a constitutional due process challenge to the agency's methods for assessing the existence of a continuing disability. *See* 424 U.S. at 323. The Court did not directly address § 405(g)'s "after a hearing" requirement, but instead considered "whether the denial of Eldridge's claim to continued benefits was a sufficiently 'final' decision with respect to his constitutional claim to satisfy the statutory exhaustion requirement." *Id.* at 330. Invoking *Salfi*, the Court held that "cases may arise where a claimant's interest in having a particular issue resolved promptly is so great that deference to the agency's judgment [on exhaustion] is inappropriate." *Id.* *Mathews* presented such a case because "Eldridge's constitutional challenge is entirely collateral to his substantive claim of entitlement," and because "[a] claim to a predeprivation hearing as a matter of constitutional right rests on the proposition that full relief cannot be obtained at a postdeprivation hearing." *Id.* at 331. On those bases, the Court deemed § 405(g) satisfied.

3. Here, the Solicitor General reads *Salfi* and *Mathews* as holding that "where SSA has determined that an oral hearing is not necessary to issue a final decision, judicial review of that decision is not barred for lack of a hearing." SG Br. 36. Petitioner agrees. Petr. Br. 23–24.

They are both wrong, as this Court made clear in *Sanders*. There, a claimant sought judicial review of a decision against reopening the disallowance of his claim for benefits. *See* 430 U.S. at 102. Invoking *Cappadora*, the Solicitor General argued that the claimant could not satisfy § 405(g)'s hearing requirement: "Manifestly such a refusal is not 'made after a hearing' within the meaning of the statute. In using that language, Congress evidently intended to reserve judicial review for administrative actions that disposed of claims with respect to which the claimant had been afforded a right to a prior hearing. But there is no entitlement to a hearing on a request to reopen a previously adjudicated claim; determinations of such requests are properly made without a hearing and not 'after a hearing.'" U.S. Br. 17–18, *Sanders*, No. 75-1443 (citing, *inter alia*, *Cappadora*, 356 F.2d at 4).

In response, the claimant in *Sanders*—like the parties here—argued that § 405(g)'s hearing requirement did not block his suit: "In *Weinberger v. Salfi*, 422 U.S. 749 (1975) as well as in *Mathews v. Eldridge*, 424 U.S. 319 (1976) the Court held that the District Court does indeed have jurisdiction to review decisions of the Secretary even though such decisions are not such as were made after a hearing. In each of the foregoing cases the Court held that the requirement of a hearing may be waived." Resp. Br. 11, *Sanders*, No. 75-1443.

Presented with the same argument about *Salfi* and *Mathews* that the parties advance here, this Court squarely rejected it—and instead accepted Solicitor General Bork's interpretation. Citing *Cappadora*, the Court first noted that "a petition to reopen a prior final decision may be denied without a hearing." *Sanders*, 430 U.S. at 108. This fact barred judicial review under § 405(g), the Court elaborated, because "the opportunity to reopen final decisions and any hearing convened to determine the propriety of such action are afforded by the Secretary's regulations and *not by the Social Security Act*." *Id.* (emphasis added). This reasoning obviously rested on the premise—articulated by Judge Friendly and briefed by Solicitor General Bork—that § 405(g) permits review *only* where the Act itself provides for a hearing.

After completing this textual analysis of § 405(g), the Court also cited legislative purpose: "[A]n interpretation that would allow a claimant judicial review simply by filing and being denied a petition to reopen his claim would frustrate the congressional purpose . . . to impose a 60-day limitation upon judicial review of the Secretary's final decision on the initial claim for benefits." *Id.*

Dispelling any doubt about the implications of its holding, *Sanders* then distinguished *Salfi* and *Mathews* on the ground that both cases had excused § 405(g)'s exhaustion and hearing requirements solely on the basis of constitutional avoidance. *See id.* at 109 ("[T]hose cases merely adhered to the well-established principle that when constitutional questions are in issue, the availability of judicial review is presumed, and we will not read a statutory scheme to take the 'extraordinary' step of foreclosing jurisdiction unless Congress' intent to do so is

manifested by 'clear and convincing' evidence." (citations omitted)). Absent constitutional concerns, *Sanders* held that § 405(g) applies with full force and permits judicial review only when the Social Security Act itself provides for a hearing on the disputed question. *See id.* at 107–09; *accord Ellis v. Blum*, 643 F.2d 68, 75 n.6 (2d Cir. 1981) (Friendly, J.) ("In response to the [claimant's] argument that *Salfi* and *Eldridge* had dispensed with the requirement of a hearing, the [*Sanders*] Court read those cases as limited to instances in which constitutional issues were raised and a denial of s 405(g) jurisdiction would close 'the federal forum to the adjudication of colorable constitutional claims.'" (citing *Sanders*, 430 U.S. at 109)).

4. Since *Sanders*, courts have widely recognized that § 405(g) limits review to final decisions reached after a hearing required by the Act. As the Second Circuit explained decades ago, *Sanders* "excluded from the scope of [§ 405(g)] all decisions that were not *required* to be preceded by a hearing, whether or not they were in fact preceded by a hearing." *Latona v. Schweiker*, 707 F.2d 79, 81 (2d Cir. 1983); *see also Brandyburg v. Sullivan*, 959 F.2d 555, 560 (5th Cir. 1992); *Peterson*, 631 F.2d at 631; *Sheehan*, 593 F.2d at 325.

Then-Judge Kavanaugh adopted this reading of § 405(g)—and of *Sanders*—in *Stovic.*, 826 F.3d 500. In that case, a retired railroad worker (Stovic) petitioned for review of the Railroad Retirement Board's denial of his request to reopen a prior decision confirming its initial calculation of his benefits. *See id.* at 501–02. The government argued that the court lacked jurisdiction, citing Section 5(f) of the Railroad Unemployment Insurance Act, which limits review to "any final decision of the Board." *Id.* at 502. To support its position, the

government cited § 405(g) of the Social Security Act. But Judge Kavanaugh's opinion for the court rejected this analogy. Section 405(g), he explained, differs from Section 5(f) by virtue of its restriction to final decisions "after a hearing." *Id.* at 503. And in *Sanders*, "after consulting the text of [§ 405(g)]," this Court had "held that denials of requests to reopen were not reviewable" because "the Social Security Act does not *require a hearing* for requests to reopen." *Id.* at 503–04 (emphasis added). Since Section 5(f) lacked a comparable restriction, Judge Kavanaugh added, the government's reliance on § 405(g) was misplaced.

Sanders thus forecloses the parties' argument that Mr. Smith satisfied § 405(g)'s hearing requirement by following the agency's own procedures to seek review of untimely Appeals Council filings. *See* Petr. Br. 23–24; SG Br. 28, 35–37. Because the Social Security Act did not entitle him to a hearing on this point, he cannot invoke § 405(g) to obtain judicial review of the agency's decision.

5. Nor can the petitioner prevail on his passing assertion that § 405(g) was satisfied when he appeared for the original ALJ hearing on his claim for benefits. *See* Petr. Br. 23. Judicial review is confined to a "final decision of the Commissioner of Social Security made after a hearing." 42 U.S.C. § 405(g). In context, the sentence plainly refers to a "final decision" reached "after a hearing" *on that decision*. It would be unnatural to read the statute as throwing open the gates to judicial review of any final decision, no matter how collateral, after the ALJ holds an initial hearing on the merits of a claim for benefits. As Judge Friendly made clear, § 405(g) was not meant to apply to "a decision which could lawfully have been made without any hearing at all and in that event

plainly would not have come under the terms of the section." *Cappadora*, 356 F.2d at 4. This structure would be defeated if § 405(g) did, in fact, apply to *many* such final decisions, so long as they were made after an earlier hearing on some entirely unrelated issue.

6. As a last resort, the Solicitor General invokes § 405(h) to argue that "an oral hearing is not always necessary to produce a binding and reviewable agency decision." U.S. Br. 36. Section 405(h) provides that "the findings and decision of the Commissioner of Social Security after a hearing shall be binding upon all individuals who were parties to such hearing." The Solicitor General first points to *Salfi*'s holding that § 405(h)'s preclusion of review outside § 405(g) applies even when a claimant need not exhaust her remedies (or participate in a hearing) because she has raised a constitutional claim. The Solicitor General adds that the Commissioner's regulations permit ALJs to issue decisions with binding effect under § 405(h) even when all relevant parties consent to not holding a hearing. *See* SG Br. 36; 20 C.F.R. § 416.1448(b)(i).

These arguments offer no warrant for departing from the statutory text, or from this Court's holding in *Sanders*. First, *Salfi*'s approval of bypassing exhaustion and hearing requirements was based solely on constitutional avoidance principles, not an interpretation of "after a hearing" in § 405(g) (or § 405(h)). *See Sanders*, 430 U.S. at 108–09. And second, the fact that parties can obtain judicial review following consensual waiver of a statutorily-authorized hearing does not prove that judicial review is permitted in the absence of such statutory authorization.

It therefore follows directly from *Sanders* that Mr. Smith did not receive a "final decision . . . after a hearing" regarding the timeliness of his request for Appeals Council review (or his entitlement to a discretionary good cause exception). Wholly independent from his lack of a "final decision," this failure to satisfy the "after a hearing" requirement requires affirmance.

D. The agency's interpretation of § 405(g) is also supported by longstanding practice in many other contexts.

The interpretation of § 405(g) set forth above is not limited to the context of Social Security claimants insisting upon the timeliness of their administrative appeals or their entitlement to a good-cause extension. On the basis of that interpretation, courts have declined to review many other procedural determinations that may cause a claimant's proceeding to terminate without an award of benefits. As we explain below, unsettling the law would therefore create significant floodgate concerns.

In addition, statutes for other massive benefits programs—including, most notably, Medicare and Medicaid—expressly incorporate § 405(g) into their provisions for judicial review. In cases arising from these statutes, courts have relied upon the interpretation of § 405(g) accepted below but challenged here by the parties. These cases underscore both the reasonableness of the judgment below and the size and complexity of the regulatory apparatuses that a reversal would disrupt.

1. Social Security

There are several additional grounds on which a social security proceeding can terminate that have long

been understood to fall outside § 405(g) for the same reasons set forth above.

a. Dismissal of requests for an ALJ hearing when request is untimely or claimant fails to appear: As the Solicitor General acknowledges, accepting his position would resolve a circuit split on this issue. *See* SG Br. 37. But the split is quite lopsided. Only the Seventh Circuit has expressly held that § 405(g) permits judicial review under these circumstances. *See Boley v. Colvin*, 761 F.3d 803, 805 (7th Cir. 2014). Most other courts have held to the contrary, relying in whole (or in part) on the interpretation of § 405(g) above. *See Doe v. Sec'y of Health & Human Servs.*, 744 F.2d 3, 4 (1st Cir. 1984) ("final decision"); *Penner v. Schweiker*, 701 F.2d 256, 259–60 (3d Cir. 1983) ("after a hearing"); *accord Hilmes v. Sec'y of Health & Human Servs.*, 983 F.2d 67, 70 (6th Cir. 1993); *Brandyburg*, 959 F.2d at 559; *White v. Schweiker*, 725 F.2d 91, 94 (10th Cir. 1984).

b. Denying extension of time to seek judicial review: Every court to have considered the question has held that § 405(g) prohibits judicial review of agency decisions denying requests for an extension of the time to file a civil action in federal court. Many of these decisions rest on the interpretation of "after a hearing" set forth above. *See, e.g.*, *Dozier v. Bowen*, 891 F.2d 769, 771 (10th Cir. 1989); *Turner v. Bowen*, 862 F.2d 708, 709–10 (8th Cir. 1988); *McCall v. Bowen*, 832 F.2d 862, 863 (5th Cir. 1987); *Peterson v. Califano*, 631 F.2d 628, 630 (9th Cir. 1980).

c. Denying extension of time to seek reconsideration: Only one court has addressed this question. Citing *Sanders*, and observing that the Social Security Act "permits such a request to be denied without a hearing,"

the court dismissed under § 405(g). *See Giacone*, 656 F.2d at 1243.

d. Dismissing based on administrative res judicata: This is one of the most common, non-merits-based grounds for dismissal of social security claims. Again, many courts have relied on the analysis set forth above to hold that such dismissals are not reviewable under § 405(g). *See, e.g.*, *Brown v. Sullivan*, 932 F.2d 1243, 1245–46 (8th Cir. 1991); *Rios*, 614 F.2d at 26–27; *accord Nelson v. Sec'y of Health & Human Servs.*, 927 F.2d 1109, 1111 (10th Cir. 1990); *Davis v. Schweiker*, 665 F.2d 934, 935 (9th Cir. 1982); *Hensley v. Califano*, 601 F.2d 216, 216 (5th Cir. 1979) (per curiam)

2. Medicare

a. Dismissal of untimely petitions for administrative review of Medicare Part A and B benefits determinations: In disputes arising under Medicare Part A and Part B, judicial review of the "final decision" by the Secretary of Health and Human Services is authorized "as is provided in [§ 405(g)]." 42 U.S.C. § 1395ff(b)(1)(a). Relying on the interpretation of "final decision" set forth above, many courts have held that when relevant administrative actors within the Medicare system dismiss petitions for review as untimely, those dismissals do not constitute "final decision[s]" authorizing judicial review. *See, e.g.*, *Almy v. Sebelius*, No. 09-Civ-0255, 2014 WL 910197, at *8 (D. Md. Mar. 7, 2014); *A & K Med. Supplies v. Sebelius*, No. 10-Civ-9453, 2012 WL 1556530, at *4 (C.D. Cal. May 1, 2012); *Courtney v. Choplin*, 195 F. Supp. 2d 649, 656 (D.N.J. 2002); *see also Tucker v. Sebelius*, No. 07-Civ-2230, 2010 WL 2761525, at *6 (D.N.J. July 12, 2010); *Tudor on Behalf of Sanders v. Shalala*, 863 F. Supp. 119, 124 (E.D.N.Y. 1994).

b. Dismissal of untimely petitions for administrative review of Medicare Part C benefits and overcharging determinations: Medicare Part C plans allow private insurance companies to contract with the federal government to provide Medicare benefits to enrollees. Under 42 U.S.C. § 1395w-22(g)(5), an enrollee who believes that it did not "receive any health service to which [it] is entitled," or who believes it was overcharged, is entitled to a hearing before HHS to the same extent as provided in § 405(b) (so long as the amount in controversy is $1,000 or more). Such enrollees are also "entitled to judicial review of the Secretary's final decision as provided in [§ 405(g)]." In an unpublished opinion, the Tenth Circuit has concluded that federal courts lack jurisdiction under § 405(g) to review determinations under § 1395w-22(g)(5) where the agency determined that a Medicare Part C beneficiary lacked good cause for failing to appear at an ALJ hearing. *See Estate of Lego v. Leavitt*, 244 F. App'x 227, 231 (10th Cir. 2007). For this conclusion, it relied on the Fifth Circuit's decision in *Brandyburg*, 959 F.2d at 559, which in turn relied on the interpretation of § 405(g) set forth above.

c. Untimely benefits appeals to the Provider Reimbursement Review Board: Much like the Social Security Act, the Medicare Act provides that benefits decisions will be made in the first instance by an agency-designated officer (fiscal intermediaries), with a right of appeal to an agency board (the Provider Reimbursement Review Board). *See* 42 U.S.C. § 1395*oo*(a)(1)(A). Requests for a Board hearing must be filed "within 180 days after notice of the intermediary's final determination." *Id.* § 1395*oo*(a)(3). The Board may extend this time limit "upon a good cause showing." 42 C.F.R. § 405.1836. Judicial review of Board decisions is limited to "any final

decision of the Board." 42 U.S.C. § 1395*oo*(f)(1); *see also* 42 U.S.C. § 1395ii (providing that § 405(h) of the Social Security Act also applies with respect to the Medicare Act).

Most courts to have considered the question have held that when a provider files an untimely petition for review and the Board dismisses it under § 1395*oo*(a)(3), the Board dismissal does not constitute a "final decision" authorizing judicial review under § 1395*oo*(f)(1). *See Saline Cmty. Hosp. Ass'n v. Sec'y of Health & Human Servs.*, 744 F.2d 517, 520 (6th Cir. 1984); *Athens Cmty. Hosp., Inc. v. Schweiker*, 686 F.2d 989, 994 & n.4 (D.C. Cir. 1982); *Russell-Murray Hospice, Inc. v. Sebelius*, 724 F. Supp. 2d 43, 50 (D.D.C. 2010); *John Muir Mem'l Hosp., Inc. v. Califano*, 457 F. Supp. 848, 853 (N.D. Cal. 1978). Similarly, most courts have held that the denial of a good cause extension of the 180-day deadline is not a "final decision" authorizing judicial review under § 1395*oo*(f)(1). *See Lenox Hill Hosp. v. Shalala*, 131 F. Supp. 2d 136, 141 (D.D.C. 2000) (collecting cases); *see also Miami Gen. Hosp. v. Bowen*, 652 F. Supp. 812, 814 (S.D. Fla. 1986); *Cambridge Hosp. Ass'n v. Bowen*, 629 F. Supp. 612, 615–20 (D. Minn. 1986).

The interpretation of "final decision" underlying these decisions mirrors the interpretation of "final decision" in § 405(g) set forth above. If this Court accepts the parties' arguments here, it may also invite appeals challenging timeliness rulings by the Board.

II. The agency's longstanding interpretation is at a minimum reasonable and therefore entitled to deference.

As explained above, the best reading—based on the text, context, and structure of the statute, this Court's

precedents, and the interpretation of parallel provisions—is that § 405(g) does not confer a right of judicial review where the agency deems a claimant's Appeals Council petition to be untimely (and unworthy of a discretionary good cause extension of the time limit). A dismissal on that ground is neither a "final decision" nor one "made after a hearing" under § 405(g). At a minimum, however, "[t]he SSA's interpretation of [§ 405(g)], adhered to without deviation for many decades, is at least reasonable; the agency's reading is therefore entitled to this Court's deference." *Astrue*, 566 U.S. at 558.

This Court has repeatedly deferred to the agency in social security cases, citing the "need for agency expertise and administrative experience," "the vast number of claims" at stake, and the length of time that the agency has considered and maintained its positions. *Walton*, 535 U.S. at 225; *see Your Home Visiting Nurse Servs.*, 525 U.S at 453–54 (deferring to agency's interpretation of the term "final determination" as "within the bounds of reasonable interpretation"). Even before *Chevron*, this Court regularly deferred to the agency in light of the "exceptionally broad authority" delegated to it by Congress via the Social Security Act. *Schweiker v. Gray Panthers*, 453 U.S. 34, 43 (1981); *see Batterton v. Francis*, 432 U.S. 416, 426 (1977) ("A reviewing court is not free to set aside those regulations simply because it would have interpreted the statute in a different manner.").

Under this Court's precedents, the agency's reading "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by

the courts." *Entergy*, 556 U.S. at 218; *see also Thomas*, 540 U.S. at 26 ("[W]hen a statute speaks clearly to the issue at hand, we must give effect to the unambiguously expressed intent of Congress, but when the statute is silent or unambiguous, we must defer to a reasonable construction by the agency charged with its implementation."). Accordingly, it is the burden of those who would cast aside a regulation to show that the statute unambiguously compels a contrary reading or the agency's stance is unreasonable.

1. The parties here make virtually no attempt to carry that burden. The Solicitor General makes no mention of *Chevron* deference, does not address any potential ambiguity in § 405(g), and contends only that the agency's long-held interpretation is "inconsistent" with his own newly-adopted interpretation. SG Br. 40–41. For his part, Mr. Smith acknowledges *Chevron* but contends that any ambiguity in § 405(g) should be resolved not by the agency charged with administering it but by the "presumption in favor of judicial review." Petr. Br. 20. Yet given that "judicial review is the exception, not the rule, in these cases," such presumptions have no place here. U.S. Br. 11, in *Sanders*, 75-1443; *see* 42 U.S.C. § 405(h). And there are many respects in which judicial review of social security decisions departs from the administrative law norm. *See Hudson*, 490 U.S. at 885.

Both parties' positions (or lack thereof) on deference are inadequate in light of this Court's repeated recognition that one of the key phrases at issue—"final decision"—is "left undefined by the Act" and delegated to the agency to "flesh out by regulation." *Salfi*, 422 U.S. at 765–66; *see also Sims*, 530 U.S. at 107. The Court has also emphasized that the meaning of "final decision" in

§ 405(g) is context-specific and "intensely practical." *Mathews*, 424 U.S. at 331 n.11. The statute gives the agency "complete authority" to specify its meaning "as [it] deems serve [its] own interests in effective and efficient administration." *Salfi*, 422 U.S. at 765–66. A more prototypical case for deference is hard to imagine.

As for the "after a hearing" requirement, the agency's long-held reading is the one that no less an authority than Judge Friendly pronounced "*the* reasonable reading," while also candidly acknowledging that the statute "could be interpreted as applying to any final decision of the Secretary that was handed down after a hearing." *Cappadora*, 356 F.2d at 4. The agency's "reasonable reading" is also the same one adopted by Solicitor General Bork, this Court in *Sanders*, numerous lower courts, and, most recently, then-Judge Kavanaugh in *Stovic*. The parties would be hard pressed to contend that this same reading of the statute is both unreasonable and unambiguously foreclosed by Social Security Act.

The parties likewise ignore the significance of the agency's unbroken consistency in articulating its reading of the statute. "This Court will normally accord particular deference to an agency interpretation of longstanding duration." *Walton*, 535 U.S. at 220 (deferring to an interpretation of the Social Security Act maintained by the agency for four decades). Here, the relevant regulation has the force of law, was the product of notice-and-comment rulemaking, has been on the books since 1980, has engendered reliance by all but one circuit to consider it, and was preceded by decades of consistent government positions—including briefs filed by multiple Solicitors General in this Court. Given that background, it should make no difference that the Solicitor General

(but not the agency's lawyers) have now decided to switch positions. *See Stutson v. United States*, 516 U.S. 163, 187 (1996) (Stevens, J. concurring) ("[S]urely a decent concern for those litigating against the Government and for our lower court judges should induce us to disregard, for *Chevron* purposes, a litigating position *first expressed at the certiorari stage*."). The proper way to change a regulation produced by notice-and-comment rulemaking is through notice-and-comment rulemaking—not an abrupt change of position in this Court.

2. The case for affording deference to the agency's decades-old interpretation of the Social Security Act is bolstered by its understanding of the practical administrative realities of operating what may be the largest administrative claims system in the western hemisphere. Even under the existing restrictive regime, social security claimants filed 19,020 cases in federal district courts in Fiscal Year 2017—by the far the largest category of cases filed each year.[8] (For comparison, 2,021 tort actions, 622 prisoner civil rights cases, and 12,628 prisoner motions to vacate sentences (the second highest category) were filed during the same period.)

The sheer number of claims that could enter the courts as a result of a reversal in this case would pose an institutional cost—both to the agency and to the judiciary. According to the Solicitor General's own estimates, the Social Security Administration processes "more than two million claims . . . each year" and "thousands are dismissed each year for failure to adhere to a regulatory timing requirement." SG Br. 43. And

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[8] *See United States Courts, Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2017*, https://perma.cc/AXE9-YZ34.

these estimates do not even include the dozen other programs that incorporate § 405(g), and that have been interpreted *in pari materia*, which would open the door even wider. In fiscal year 2015, for example, the Department of Health and Human Services and its contractors processed over 213 million Medicare Part A claims and over one billion Medicare Part B claims. *See* HHS, *2016 CMS Statistics Reference Booklet*, at 42.[9] It is precisely to avoid burdening the federal courts with such cases that Congress enacted sections 405(g) and 405(h) in the first place, and then patterned the judicial-review mechanisms for other high-volume claims processes on § 405(g).

As a practical matter, there is not much benefit to be had for claimants in comparison to the costs of permitting judicial review of the Appeals Council's timeliness determinations. The Eleventh Circuit's experience in allowing such claims since *Bloodsworth v. Heckler*, 703 F.2d 1233 (11th Cir. 1983), demonstrates that the cases permitted by the parties' interpretation of § 405(g) are unlikely to raise the kinds of legal questions that require federal judicial involvement. Instead, they are likely to be bound up in simple, specific factual issues (such as whether a letter was mailed by a certain date) or in wholly discretionary agency decisions (such as whether a claimant had good cause to get an extension). *See, e.g.*, *Morris v. Berryhill*, No. 1:15-Civ-495, 2017 WL 600089, at *1 (M.D. Ala. Feb. 14, 2017); *Wright v. Colvin*, No. 3:12-Civ-1007, 2013 WL 5567409, at *5–*7 (M.D. Fla. Oct. 9, 2013); *Maxwell v. Comm'r of Soc. Sec.*, No. 6:12-Civ-5, 2013 WL 298267, at *3 (M.D. Fla. Jan. 25, 2013). These questions are well within the competence of the

[9] https://perma.cc/9L4D-9LZW.

Social Security Administration and are unlikely to benefit materially from an additional layer of review in federal court, as compared to the offsetting judicial and administrative costs of allowing all of these cases to be filed. *See Thomas*, 540 U.S. at 29 ("Perfection in processing millions of such claims annually is impossible.").

This is particularly so in light of the applicable standards of review. As the Solicitor General acknowledges, given these standards, "[i]t should be a rare case in which a claimant can plausibly maintain that SSA's finding of untimeliness is not supported by substantial evidence, or that SSA abused its discretion in refusing to grant a good-cause exception." SG Br. 44. For the rare cases where the agency has manifestly transgressed its regulations, mandamus may be available. *See Your Home Visiting Nurse Servs.*, 525 U.S. at 456 n.3 (reserving this question). In the mine run of social security cases, however, when a claimant is "alleging mere deviation from the applicable regulations in a particular administrative proceeding," the courts have no special competence to add to the "agency's expertise in administering its own regulations." *Bowen*, 476 U.S. at 484–85.

On the other hand (and perhaps counterintuitively), it may well disadvantage claimants if the judgment below is reversed. As Judge Friendly pointed out many years ago, "the broader reading could operate adversely to claimants generally since if a nonmandatory hearing would entail judicial review not otherwise available, this might deter the agency from giving a procedural benefit which the statute does not demand." *Cappadora*, 356 F.2d at 5. Wholly apart from the institutional costs to the affected agencies and courts, it is possible that the

broader rule urged by the parties here would, if adopted, actually hurt more claimants than it would help.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX OF STATUTES INCORPORATING 42 U.S.C. § 405(g)

1. Unemployment compensation for certain former federal employees (5 U.S.C. § 8503(b)) 1

2. Compensation to workers for injury caused by import competition as provided in the Trade Act of 1974 for states with no agreement with the Department of Labor (19 U.S.C. § 2312(b)) 1

3. Claims for benefits for miners and spouses of deceased miners suffering from black lung (30 U.S.C. § 923(b)) 1

4. Disability determinations for old–age, survivors, and disability insurance benefits (42 U.S.C. § 421(d)) 2

5. Special benefits for certain World War II veterans (42 U.S.C. 1009(b)) 2

6. Exclusions of certain individuals and entities from Medicare for misconduct. (42 U.S.C. § 1320a-7(f)(1)) 2

7. Exclusion of representatives and health care providers convicted of violations from participation in social security programs (42 U.S.C. § 1320b-6(e)) 3

8. Review of sanctions and penalties regarding quality and compliance for health care practitioners or other persons regarding (42 U.S.C. § 1320c-5(b)(4)) 3

9. Supplemental security income benefit entitlement (42 U.S.C. § 1383(c)(3)) 4

10. Administrative review of Medicare Part C benefits and overcharging determinations (42 U.S.C. § 1395w-22(g)(5)) 4

11. Eligibility for low-income subsidies for Medicare Part D (42 U.S.C. § 1395w-114(a)(3)(B)(iv)(III)) 5

12. Medicare eligibility for providers of services (42 U.S.C. § 1395cc(h)(1)(A)) 5

13. Medicare Part A and B benefits determinations (42 U.S.C. § 1395ff(b)(1)(A)) 6

14. Administrative review of Medicare services and overcharging determinations for enrollees belonging to HMOs and competitive medical plans (42 U.S.C. § 1395mm(c)(5)(B)) 6

15. Medicare payment eligibility for dialysis facilities (42 U.S.C. § 1395rr(g)(3)) 7

16. Medicaid payment eligibility for intermediate care facilities for the mentally disabled (42 U.S.C. § 1396i(b)(2)) 8

1. **Unemployment compensation for certain former federal employees (5 U.S.C. § 8503(b))**

   5 U.S.C. § 8503(b) provides:

   A Federal employee whose claim for compensation under subsection (a) of this section is denied is entitled to a fair hearing under regulations prescribed by the Secretary. A final determination by the Secretary with respect to entitlement to compensation under this section is subject to review by the courts in the same manner and to the same extent as is provided by section 405(g) of title 42.

2. **Compensation to workers for injury caused by import competition as provided in the Trade Act of 1974 for states with no agreement with the Department of Labor (19 U.S.C. § 2312(b))**

   19 U.S.C. § 2312(b) provides:

   A final determination under subsection (a) of this section with respect to entitlement to program benefits under subpart B of this part is subject to review by the courts in the same manner and to the same extent as is provided by section 405(g) of Title 42.

3. **Claims for benefits for miners and spouses of deceased miners suffering from black lung (30 U.S.C. § 923(b))**

   30 U.S.C. § 923(b) provides:

   (b) . . . The provisions of sections 204, 205(a), (b), (d), (e), (g), (h), (j), (k), (l), and (n), 206, 207, and 208 of the Social Security Act shall be applicable under this part with respect to a miner, widow, child, parent, brother, sister, or dependent, as if benefits under this part were benefits under Title II of such Act.

4. **Disability determinations for old–age, survivors, and disability insurance benefits (42 U.S.C. § 421(d))**

42 U.S.C. § 421(d) provides:

Any individual dissatisfied with any determination under subsection (a), (b), (c), or (g) shall be entitled to a hearing thereon by the Commissioner of Social Security to the same extent as is provided in section 405(b) of this title with respect to decisions of the Commissioner of Social Security, and to judicial review of the Commissioner's final decision after such hearing as is provided in section 405(g) of this title.

5. **Special benefits for certain World War II veterans (42 U.S.C. 1009(b))**

42 U.S.C. 1009(b) provides:

The final determination of the Commissioner of Social Security after a hearing under subsection (a)(1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner of Social Security's final determinations under section 405 of this title.

6. **Exclusions of certain individuals and entities from Medicare for misconduct. (42 U.S.C. § 1320a-7(f)(1))**

42 U.S.C. § 1320a-7(f)(1) provides:

Subject to paragraph (2), any individual or entity that is excluded (or directed to be excluded) from participation under this section is entitled to reasonable notice and opportunity for a hearing thereon by the Secretary to the

same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and section 405(l) of this title, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

7. **Exclusion of representatives and health care providers convicted of violations from participation in social security programs (42 U.S.C. § 1320b-6(e))**

42 U.S.C. § 1320b-6(e)(1) and (2) provide:

(1) Any individual who is excluded (or directed to be excluded) from participation under this section is entitled to reasonable notice and opportunity for a hearing thereon by the Commissioner to the same extent as is provided in section 405(b) of this title, and to judicial review of the Commissioner's final decision after such hearing as is provided in section 405(g) of this title.

(2) The provisions of section 405(h) of this title shall apply with respect to this section to the same extent as it is applicable with respect to subchapter II.

8. **Review of sanctions and penalties regarding quality and compliance for health care practitioners or other persons regarding (42 U.S.C. § 1320c-5(b)(4))**

42 U.S.C. § 1320c-5(b)(4) provides:

Any practitioner or person furnishing services described in paragraph (1) who is dissatisfied with a determination made by the Secretary under this subsection shall be entitled to reasonable notice and opportunity for

a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title.

9. Supplemental security income benefit entitlement (42 U.S.C. § 1383(c)(3))

42 U.S.C. § 1383(c)(3) provides:

The final determination of the Commissioner of Social Security after a hearing under paragraph (1) shall be subject to judicial review as provided in section 405(g) of this title to the same extent as the Commissioner's final determinations under section 405 of this title.

10. Administrative review of Medicare Part C benefits and overcharging determinations (42 U.S.C. § 1395w-22(g)(5))

42 U.S.C. § 1395w-22(g)(5) provides:

An enrollee with a Medicare+Choice plan of a Medicare+Choice organization under this part who is dissatisfied by reason of the enrollee's failure to receive any health service to which the enrollee believes the enrollee is entitled and at no greater charge than the enrollee believes the enrollee is required to pay is entitled, if the amount in controversy is $100 or more, to a hearing before the Secretary to the same extent as is provided in section 405(b) of this title, and in any such hearing the Secretary shall make the organization a party. If the amount in controversy is $1,000 or more, the individual or organization shall, upon notifying the other party, be entitled to judicial review of the Secretary's final decision as provided in section 405(g) of this title, and both the individual and the organization shall be entitled to be parties to that judicial

review. In applying subsections (b) and (g) of section 405 of this title as provided in this paragraph, and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

11. Eligibility for low-income subsidies for Medicare Part D (42 U.S.C. § 1395w-114(a)(3)(B)(iv)(III))

42 U.S.C. § 1395w-114(a)(3)(B)(iv)(III) provides:

[J]udicial review of the final decision of the Commissioner made after a hearing shall be available to the same extent, and with the same limitations, as provided in subsections (g) and (h) of section 405 of this title.

12. Medicare eligibility for providers of services (42 U.S.C. § 1395cc(h)(1)(A))

42 U.S.C. § 1395cc(h)(1)(A) provides:

Except as provided in paragraph (2), an institution or agency dissatisfied with a determination by the Secretary that it is not a provider of services or with a determination described in subsection (b)(2) of this section shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a

reference to the Secretary or the Department of Health and Human Services, respectively.

13. Medicare Part A and B benefits determinations (42 U.S.C. § 1395ff(b)(1)(A))

42 U.S.C. § 1395ff(b)(1)(A) provides:

Subject to subparagraph (D), any individual dissatisfied with any initial determination under subsection (a)(1) of this section shall be entitled to reconsideration of the determination, and, subject to subparagraphs (D) and (E), a hearing thereon by the Secretary to the same extent as is provided in section 405(b) of this title and, subject to paragraph (2), to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title. For purposes of the preceding sentence, any reference to the "Commissioner of Social Security" or the "Social Security Administration" in subsection (g) or (l) of section 405 of this title shall be considered a reference to the "Secretary" or the "Department of Health and Human Services", respectively.

14. Administrative review of Medicare services and overcharging determinations for enrollees belonging to HMOs and competitive medical plans (42 U.S.C. § 1395mm(c)(5)(B))

42 U.S.C. § 1395mm(c)(5)(B) provides:

A member enrolled with an eligible organization under this section who is dissatisfied by reason of his failure to receive any health service to which he believes he is entitled and at no greater charge than he believes he is required to pay is entitled, if the amount in controversy is $100 or more, to a hearing before the Secretary to the same extent as is provided in section 405(b) of this title,

and in any such hearing the Secretary shall make the eligible organization a party. If the amount in controversy is $1,000 or more, the individual or eligible organization shall, upon notifying the other party, be entitled to judicial review of the Secretary's final decision as provided in section 405(g) of this title, and both the individual and the eligible organization shall be entitled to be parties to that judicial review. In applying sections 405(b) and 405(g) of this title as provided in this subparagraph, and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

15. Medicare payment eligibility for dialysis facilities (42 U.S.C. § 1395rr(g)(3))

42 U.S.C. § 1395rr(g)(3) provides:

A facility dissatisfied with a determination by the Secretary under paragraph (1) shall be entitled to a hearing thereon by the Secretary (after reasonable notice) to the same extent as is provided in section 405(b) of this title, and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.

16. Medicaid payment eligibility for intermediate care facilities for the mentally disabled (42 U.S.C. § 1396i(b)(2))

42 U.S.C. § 1396i(b)(2) provides:

> Any intermediate care facility for the mentally retarded which is dissatisfied with a determination by the Secretary that it no longer qualifies as a[n] intermediate care facility for the mentally retarded for purposes of this subchapter, shall be entitled to a hearing by the Secretary to the same extent as is provided in section 405(b) of this title and to judicial review of the Secretary's final decision after such hearing as is provided in section 405(g) of this title, except that, in so applying such sections and in applying section 405(l) of this title thereto, any reference therein to the Commissioner of Social Security or the Social Security Administration shall be considered a reference to the Secretary or the Department of Health and Human Services, respectively.